Supreme Court, U.S.
FILED

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No. 94-1364 FEB 13 1995

OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term, 1994

FEI, LTD., JOHN J. FOGARTY
and JEAN FOGARTY,

Petitioners,

-against-

OLYMPIA & YORK BATTERY PARK COMPANY, also known as WFC TOWER A COMPANY; O&Y (U.S.) DEVELOPMENT CORP., as successor to O&Y TOWER C CORP.; OLYMPIA & YORK TOWER B COMPANY; OLYMPIA & YORK TOWER D COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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98 FP

QUESTIONS PRESENTED

I.

Are there not questions of fundamental fairness raised concerning issuance of a brief Summary Order affirmance of dismissal of $5M of claims nine (9) months, subsequent to a December, 1993, oral argument upon a 1988 trial severance appeal in context of such issuance on the eve of a publicly reported proceeding relating to the liable party's possible bankruptcy and in context of an oral argument which evidenced apparent plan for reversal?

II.

Does not an announced "recusal" contained solely in such brief Summary Order, however, absent all stated grounds and date of occurrence, raise questions of fundamental fairness particularly concerning a party's rights to a fair, impartial and full appeal, including *en banc* reconsideration rights?

III.

Grounded upon a 1988 trial severance ruling that $5M of FEI claims were "***really out of the case***", was there not absent FRCP R. 49(a) authority for the 1992 dismissal of such claims?

IV.

Does not FRCP R. 42(b) require that there be a trial of claims which have been "severed" at an earlier trial?

V.

May there be approval given to a December, 1992, conference ruling dismissing $5M of 1988 trial-severed claims upon grounds that in answer to special interrogatories a jury must have determined such claims upon the theory of "What O&Y Agreed To Pay", notwithstanding that in a voluminous trial and post-trial record there does not appear any contention that the jury

so was requested to answer, nor that any party or the court argued or charged upon such theory, nor that such theory was contained in either of two (2) lengthy opinions nor therein remotely referenced, but rather, that such theory appears in justification of the dismissal solely at the December, 1992, conference?

VI.

Did not the 1988 jury verdict determine that FEI substantially had performed upon the contract with O&Y, *inter alia*, because the award to O&Y upon its claim was *de minimis*, i.e., a mere 2-4 % of O&Y's alleged damages?

PARTIES

The names of all of the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follow: Olympia & York Battery Park Company, also known as WFC Tower A Company; O&Y (U.S.) Development Corp., as successor to O&Y Tower C Corp.; Olympia & York Tower B Company; Olympia & York Tower D Company (collectively, "**O&Y**"); Insurance Company of North America, Philadelphia ("**INA**"); FEI, Ltd. ("**FEI**")[1], John J. Fogarty and Jean Fogarty.

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[1]FEI, Ltd. does not have a parent or subsidiary relationship with another company, except with wholly-owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES x

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTORY AND RULE PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 2

A. Jurisdiction of the District Court 2

B. Nature of the Case, Course of Proceedings, Disposition Below 2

REASONS FOR GRANTING THE WRIT 16

A. In Both Procedure of Issuance and Substance of Ruling, The Summary Order Evidences Fundamental Unfairness 16

B. There Was a Severance of FEI's Claims; The O&Y Trial Was Not About "What O&Y Agreed To Pay" 18

C. There Was Absent Rule 49(a) Authority For Dismissal 21

D. FEI Substantially Performed 22

CONCLUSION 24

APPENDIX A -TRANSCRIPT OF
PROCEEDINGS BEFORE THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
DECEMBER 23, 1992 . . . . . 1a

APPENDIX B - ORDER OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DATED SEPTEMBER 15, 1994 . . . . . 21a

APPENDIX C - ORDER OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DENYING PETITION
FOR REHEARING IN BANC
DATED NOVEMBER 15, 1994 . . . . . 23a

APPENDIX D - RULE 54(b) JUDGMENT
AND ORDER OF CONDITIONAL DISMISSAL
DATED MAY 4, 1993 . . . . . 24a

APPENDIX E - RULE 54(b)
CERTIFICATION,
DATED MAY 4, 1993 . . . . . 26a

APPENDIX F - MARCH, 1988, TRIAL
FEI EXHIBIT 317,
"RECAP OF PAYMENTS,"
ANNEXED TO NOVEMBER, 1985,
FEI THIRD-PARTY COMPLAINT,
IN EVIDENCE AT MARCH, 1988, TRIAL
(F. GUILFOYLE AND
J. FOGARTY TESTIMONY,
See App P, MARCH, 1988,
TRIAL TRANSCRIPT, at 63a,
and Apps R at 76a and S at 110a) 28a

APPENDIX G - MARCH, 1988, TRIAL

FEI EXHIBIT 318 FOR IDENTIFICATION
[COVER PAGE 318A "IN EVIDENCE",
ANNEXED DOCUMENTATION, (40 PAGES),
NOT IN EVIDENCE] 31a

APPENDIX H - MARCH, 1988 TRIAL
O&Y EXHIBIT 15, IN EVIDENCE
"O&Y LOSSES" 32a

APPENDIX I - MARCH 1988 TRIAL
INTERROGATORIES FOR JURY 33a

APPENDIX J - OPINION OF THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
DATED SEPTEMBER 19, 1988 . . . . . 35a

APPENDIX K - EXCERPTS FROM
FEI FRCP RULE 16 AFFIDAVIT
SWORN TO NOVEMBER 30, 1988 . . . . . 46a

APPENDIX L - OPINION OF THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
DATED JUNE 2, 1989 . . . . . 49a

APPENDIX M - FINAL JUDGMENT
AS TO
INSURANCE COMPANY OF NORTH AMERICA
OF THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK
DATED SEPTEMBER 24, 1991 . . . . . 56a

APPENDIX N - SELECTED
EXHIBITS TO FEI MOTION FOR TRIAL
DATED APRIL 9, 1993

(VARIOUS ITEMS OF CORRESPONDENCE) . . 58a

APPENDIX O - NOTICE OF MOTION FOR TRIAL UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK WITH MEMORANDUM ORDER ENDORSED DENYING MOTION, DATED MAY 3, 1993 . . . 61a

APPENDIX P - EXCERPTS FROM FEI'S MAIN BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 10, 1993 . . . . . 63a

APPENDIX Q - EXCERPT FROM O&Y'S OPPOSITION BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 13, 1993 . . . . . 73a

APPENDIX R - EXCERPTS FROM FEI'S REPLY BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED OCTOBER 27, 1993 . . . . . 76a

APPENDIX S - TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 22, 1993 . . . . . 87a

APPENDIX T - LETTER OF COUNSEL FOR FEI, LTD. ET AL. TO CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JANUARY 4, 1994 . . . . . 112a

APPENDIX U - LETTER FROM
COUNSEL FOR O&Y TO CLERK OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DATED JANUARY 4, 1994 . . . . . 116a

APPENDIX V - MOTION BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
TO EXPEDITE DECISION
DATED SEPTEMBER 14, 1994 . . . . . 121a

APPENDIX W - MOTION BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
RELATING TO EN BANC REHEARING
DATED SEPTEMBER 21, 1994 . . . . . 131a

APPENDIX X - ORDER OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DENYING MOTION RELATING
TO EN BANC REHEARING
UNDATED; DOCKETED OCTOBER 11, 1994 . 136a

APPENDIX Y - CRAIN'S NEW YORK
DECEMBER 5-11, 1994, EXCERPT
"O&Y PAY BATTLE SLOWS DEAL" 138a

APPENDIX Z - FRCP RULE 42(b) 140a

APPENDIX AA - FRCP RULE 49(a) 140a

APPENDIX BB - 28 U.S.C. §46 . . . . . 141a

APPENDIX CC - FRAP EN BANC STATUTE
FRAP RULE 35(b) 141a

APPENDIX DD - SECOND CIRCUIT
IN BANC RULE:

LOCAL RULE 35 -
DETERMINATION OF MAJORITY FOR
ORDERING IN BANC CONSIDERATION;
COPY OF OPINIONS
OR SUMMARY ORDER REQUIRED. 142a

APPENDIX EE - SECOND CIRCUIT
QUORUM RULE:
LOCAL RULES RELATING TO THE
ORGANIZATION OF THE COURT:
§ 0.14 QUORUM 142a

APPENDIX FF - MURRAY CASE 143a

TABLE OF AUTHORITIES

Page

CASES

Alm v. Unified Church Structures, Inc.,
403 NYS 2d 151 (AD 4 Dept., 1978) 23

Buckley & Co. v. New York, 505 NYS 2d 140
(AD 1 Dept., 1986) 23

Cutlass Productions, Inc. v. Breyman,
682 F.2d 323 (2nd Cir. 1981) 22

Eichleay Corp., 60-2 B.C.A. (CCH) ¶2688 (1960) 19

*George Hyman Const. v. Wash. Metro. Transit
Auth.*, 816 F.2d 753 (D.C.Cir. 1987) 19

Gross v. Black & Decker (U.D.) Inc., 695 F.2d 858
(5th Cir. 1983) 21

Guerini Stone Co. v. P.J. Carlin Constr. Co.,
248 U.S. 334, 39 S. Ct. 102, 63 L.Ed. 275 (1919) 19

Hearn v. City of Gainesville, 688 F.2d 1328
(11th Cir. 1982) 22

Kenford Co., Inc. v. County of Erie,
502 NYS 2d 131 (Ct. App., 1986) 23

Knapp v. McFarland, 457 F.2d 881 (2nd Cir. 1972) 18

Matine v. Union Pacific R., Co., 714 F.2d 1028
(9th Cir. 1983) 22

Murray v. National Broadcasting Co., et al.,
No. 93-9335 (No. 1566) (2nd Cir. Aug. 12, 1994) 17

Najjar Industries, Inc. v. City of New York,
446 NYS 2d 302 (AD 1 Dept., 1982), *aff'd*
454 NYS 2d 65, (Ct. App., 1982) 19

Peter Kiewit Sons Co. v. Summit Construction Co.,
422 F.2d 242 (8th Cir. 1969) 19

S. Leo Harmonay, Inc. v. Binks Mfg. Co.,
597 F.Supp. 1014 (SDNY 1984), *aff'd* 762
F.2d 990 (2nd Cir. 1985) 19

Taherzadeh v. Clements, 781 F.2d 1093
(5th Cir. 1986) 22

United States Gypsum Co. v. Shiavo Bros., Inc.,
668 F.2d 172 (3rd Cir. 1981) 18

United States v. Zara Contracting Co., 146 F.2d 406
(2nd Cir. 1944) 23

Wade Lupe Const. Co., Inc. v. B & J Roofing,
444 NYS 2d 245 (AD 3 Dept., 1981) 23

Wolf & Munier v. Whiting-Turner Contracting,
946 F.2d 1003 (2nd Cir. 1992) 23

STATUTES

United States Statutes

28 U.S.C. § 46 17

28 U.S.C. §1254(1) 1

28 U.S.C. §1332 2

RULES

Federal Rules of Appellate Procedure

35(b) 17

Federal Rules of Civil Procedure

16 4
37 4
42(b) 18
49(a) 21, 22
54(b) 15

United State Court of Appeals For the Second Circuit
Local Rules

Second Circuit Local In Banc Rule 35 17

Second Circuit Quorum Rule § 0.14(b) 17

OTHER AUTHORITIES

Crain's New York Business ("***Crain's***"),
Vol. X, No. 37, September 12-18, 1994 15

Crain's New York Business, Vol. , No. ,
December 5-11 1994 16

Wright and Miller, *Fed. Prac. & Proc.*
§2507 (1971) 22

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In The
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October Term, 1994

FEI, LTD., et al.,

Petitioners,

-against-

OLYMPIA & YORK BATTERY PARK COMPANY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS AND ORDERS BELOW

The Opinion of the District Court officially is not reported and appears in Appendix ("**App**") A at 1a. The United States Court of Appeals for the Second Circuit affirmed by Summary Order officially which is not reported and appears in App B at 21a. The Order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing *en banc* appears in App C at 23 a. The Order and Judgment of the United States District Court dismissing the action appears in App D at 24a.

JURISDICTION

The Judgment of the United States District Court for the Southern District of New York was entered on May 4, 1993. An appeal to the United States Court of Appeals for the Second Circuit was denied by Summary Order dated September 15, 1994. A timely petition for rehearing *en banc* was filed September 29, 1994, and thereafter was denied on November 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

As outlined in the Appendices, the following provisions are involved: 28 U.S.C. § 46, Second Circuit Quorum Rule § 0.14, Second Circuit In Banc Rule (Local Rule 35), FRAP Rule 35(b), and FRCP Rules 42(b), 49(a).

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

Subject matter jurisdiction in the United States District Court was grounded upon diversity of citizenship. 28 U.S.C. §1332. Respondent O&Y was alleged to be a corporation or other entity organized and existing pursuant to the laws of the State of New York. Defendant - Third - Party - Plaintiff INA was alleged to be a corporation or other entity organized and existing pursuant to the laws of the State of Pennsylvania. Petitioner FEI was alleged to be a corporation or other entity organized and existing pursuant to the laws of the Republic of Ireland. Petitioners, John J. Fogarty and Jean Fogarty were alleged to be citizens resident in the State of New York.

B. Nature of the Case, Course of Proceedings, Disposition Below

FEI, Ltd., John J.Fogarty and Jean Fogarty (collectively "**FEI**") petition concerning the dismissal of nearly $5M of claims against O&Y. The dismissal is grounded upon the court's December 23, 1992, analysis that the "basic issue" before the jury at a nearly six (6) week 1988 trial (the "**O&Y Trial**") was "**What O&Y agreed to pay**". App A at 4a, etc. However, this contention is unsupported by the record, indeed, contradicts all prior substantive proceedings, *viz.*, trial severance rulings, instructions to charge, closing arguments, a special verdict with interrogatories and two (2) prior, lengthy written Opinions, none of which remotely present any such analysis. Rather, all prior proceedings support these events: a trial exclusively upon O&Y's claim for an alleged $13.5M "overage" upon a "fixed-price" contract; an FEI defense grounded upon O&Y contributory

responsibility; the court's trial ***severance "upon consent"*** of FEI's claims and a subsequent jury verdict of FEI responsibility for approximately 2-4% of O&Y's losses, *i.e.*, the remainder of O&Y's "overage" claim refuted.

* * *

In February, 1985, O&Y, as Developer/Contractor of the World Financial Center Project, Battery Park, New York (the "**Project**"), commenced this action upon an alleged breach of contract relating to two (2) performance bonds issued by INA in favor of O&Y in the total amount of approximately $10.5M. Petitioners, John J. Fogarty and his wife, Jean Fogarty, entered personal guarantees to INA upon the bonds. O&Y had entered into subcontracts valued in the approximate amount of $10.5M with FEI concerning Buildings "A" and "C". A 421, 432.[2]

Project difficulties culminated in a November, 1984, meeting between O&Y and FEI. A 105, etc. At this time, O&Y was obligated to FEI upon Buildings ("*Bldgs*") A and C in an amount in excess of $700,000 for "retention", an amount due to be paid to FEI in February, 1985. O&Y and FEI entered upon a written understanding for completion of the Project, essentially through O&Y's financial advances and assurances, e.g., by O&Y senior executive, O. Blau, that FEI "would not get hurt". A 181, etc. Nonetheless, in February, 1985, O&Y did *not* return FEI's retention, as contractually obligated, but rather commenced this action against INA. Thereupon, INA impleaded FEI and Mr. and Mrs. Fogarty upon the bond guarantee. A 263, 273-76. In April, 1985, notwithstanding that for work, labor and services FEI had incurred in excess of $473K upon Bldg B Tower, O&Y terminated

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[2]INA had bonded the performance of FEI for two (2) buildings, "A" and "C". At least initially, FEI was to manufacture, deliver and install stone cladding upon the exteriors of the four buildings. Difficulties arose concerning Bldgs A and C relating to the supply of stone provided to FEI from an O&Y affiliate, a Canadian supplier, Granicor, Inc. ("**Granicor**") and relating to an O&Y switch in construction priority from Bldg A to Bldg C which occurred subsequent to a 1984 sale of Bldg C by O&Y to the American Express Company ("**Amex**") for in excess of $478M. A 50.

FEI upon all of Bldg B; more, in consequence of FEI's nearly $800,000 in documented claims upon Bldg "D", O&Y reduced FEI's participation upon Bldg D. A 25-27, etc. It was not until virtual completion of construction upon Bldgs A and C (April, 1986), that O&Y terminated FEI upon Bldgs A and C. A 258-59.

In June, 1986, FEI filed a Third-Party complaint against O&Y asserting claims concerning the *four* (4) building Project. A 3, 10-44, etc.[3] The trial transcript records the court's ***mid-trial severance*** for subsequent separate jury trial of FEI's claims, together with the court's directed shift in focus of ***all*** evidence, testimony and argument from FEI's complaint allegations *to* FEI defenses to O&Y's claim. (App P at 63a-69a). Subsequently, the court directed that special interrogatories be submitted to the jury. The jury answered that FEI was responsible for $600K of O&Y expenses. (App I at 33a). By Opinion dated September 19, 1988 ("**Opinion I**"), the Court denied O&Y's motion for judgment notwithstanding the verdict. (App J at 35a).

In October, 1988, the Court directed FEI to document"chapter" and "verse" written support for its claims (the "**'Chapter and Verse' Submissions**").[4] By Opinion dated June 2, 1989, ("**Opinion II**"), the Court dismissed INA upon grounds of material alteration of the bonds and denied O&Y's motion for reargument of O&Y's motion for judgment notwithstanding the

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[3]FEI encountered substantial difficulty pre-trial, particularly in context of voluminous document exchanges and court directed time limitations which precluded any FEI deposition upon any Bldg B and D claim. In consequence, *not a single witness presented by O&Y at trial*, including O&Y's expert, *had been deposed*. Notwithstanding request, particularly including repeated request for R. 37 hearing, the court did not implement any R. 16 "pre-trial order" ("PTO") procedure; also, the court denied FEI's motion for stay of trial and R. 37 hearing, notwithstanding prejudicial O&Y pre-trial abuses. A 45-103.

[4]Notwithstanding that O&Y had presented "counter-claims" in excess of $2M concerning Bldgs B and D and that FEI had been precluded any deposition upon any Bldg B and D claim, O&Y was not required to present any support for its claims. FEI's Chapter and Verse Submissions were presented in November, 1988. (A 217-19, 224-310). (App K at 46a, P at 69a-72a, and R at 76a-79a).

verdict.[5]. (App L at 49a). On February 11, 1992, the Court directed a two-week, August, 1992, trial of FEI's claims. A 397-411. (App R at 86a; see also Apps N at 58a and O at 61a). FEI prepared for trial and appeared at the scheduled date and time, but was advised that a trial had *not* been scheduled. App R at 86a; see also App N at 58a and App O at 61a. In December, 1992, at a conference, the Court dismissed FEI's claims grounded upon purported failure of stated objection to the special interrogatories, notwithstanding recognition that issues of fact remained outstanding, e.g., relating to FEI's claim for taxes ($1M) and overhead ($900K). (App A at 1a). Nonetheless, FEI's claims - those initially sought to be presented during the O&Y Trial - have been preserved for trial as ***severed***, indeed, ruled by the court to be "***out of the case***". A review of the trial transcript (March, 1988) so records (App P at 63a):

I All Evidence, Argument, of FEI's Claims *NOT* To Be Presented To Jury

THE COURT:... *Now, what I am going to rule is this*: That from here on out *until* further notice, the *evidence is to be directed*, both direct...and cross..., to the *stone problem and the changes in building priorities*.... All further cross-examination of Mr. Fogarty, Sr., will be directed to that point, and those points and *those points only*. *All further presentation of additional witnesses by FEI will be limited to those points*... (A 116)....

[I] am going to... *tell the jury* that I have ruled in this way.... I want to have them and the attorneys *focus only the two problems* which really they will have to decide, and *only those problems will resolve this case*. [T]hey are going to be asked to *switch their consideration* for the time being away from these issues. They will hear about the stone problem and the switch in priority problem,...and that's the way we will proceed. (A 117).

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[5]Notwithstanding O&Y's erroneous August 17, 1992, contention, there was *not* pending any O&Y post-trial motion for "summary judgment" or "judgment" nor has any such motion(s) ever been presented. A 401.

MR. O'CALLAGHAN: The other point, your Honor,...*the claims we began to develop*..., the excess wage claim..., *B and D* issues which began to be presented, *they are going to be put on the back burner*?

THE COURT: *Yes, absolutely*. (A 118-9);

FOGARTY, resumed. (Jury present). (App P at 64a).

THE COURT: In my view *the case rests...on this question of the stone problem and the switch in priorities. That's as far as you are concerned right now*.... (A 124)... *Does the defense case rest*?

MR. O'CALLAGHAN: *To the extent*, your Honor, *you have limited the trial* to the issues --

THE COURT: *I understand*.

MR. O'CALLAGHAN: Yes, we do. (A 128). * * *

II "You won't have a jury".

MR. O'CALLAGHAN: More or less in midstream in the case...you essentially directed that we all turn out attention to the stone to hit heart of the case. Now, FEI at that time was right in the middle of presenting its claim...(A 129), but all that was abbreviated. In fact, it wasn't presented, and so I have reflected on this because in order for FEI to present these claims, it is going to take some time....

THE COURT: I'll tell you, Mr. Callaghan, you are not going to have a jury...*You won't have a jury*. I freely concede that in order to get this case confined to what I think... you can't have a lot of people sitting in a jury who are feeling like they are chained to their seats and they are totally unwilling, you don't want that. Now, I was pretty confident that in order to get this case into a span which was workable, that we had to somehow arrive at some reasonable definition of the issues.... (A 130-31). (App P at 65a). Now, *as far as your counterclaim for damages*

for breach of contract, if you are telling me that you need several more days to present that, I'm telling *you won't have a jury*, and I *will simply sever it and we will call another trial*, because it is not practical....*[S]o we have limited the issues, and so be it*....

MR. O'CALLAGHAN: [M]r. Fogarty, Sr. was testifying...and we had some voir dire, and the jury was asked to leave, and that's where the focus of the case shifted to stone again.... (A 131-32).

THE COURT: ...[I] don't believe you were ever cut off or prevented from showing....Now, you look at the record, and if you were prevented and cut off, well, I will stand corrected. *What I was trying to cut off wasn't your showing the back-up for your damage items*.... (A 133-34). But you can read the record over and *correct me if I am wrong*. The point is that you have rested your case and, I don't think you were prevented from putting anything on about your damages that you wanted to put on. Before you go any further, you study the record. A 135-36.

MR. O'CALLAGHAN: I have an understanding of it...and I represented at that time we had claims to discuss, including the anticipatory breach on Building B and D, and when I rested my case, it was on the understanding it was being *rested on the A and C stone issue alone*.

THE COURT: I think you better re-study the record. I don't think that's a faithful recital of it....One way or the other, *we will get this jury instructed by the end of the day tomorrow*. (A 136). (App P at 66a-67a). * * *

III Severance: "The Third-Party claims [are] really out of the case"

MR. O'CALLAGHAN: Last evening we had some discussion about FEI's claims and I went through the transcript....I made three pages.... [A 116-119].. close on [A 128].

THE COURT: All right. (Pause) *Well, you are absolutely right. Absolutely right*. So what do you propose?... (A 137).

MR. O'CALLAGHAN: [I] have no choice but to ask that they be *severed and tried at a later time*.

THE COURT: You are certainly right in your memory of the transcript, and you have shown it to me. And we have to deal with it in a sensible way.... (A 138). And what is *O&Y's position* on that?

MR. SELTZER: *We agree to the severance of FEI's third party claims against O&Y.* We agree to the severance.

THE COURT: The *application is granted on consent....*

MR. O'CALLAGHAN: One further point, your Honor. May I ask that the court provide some *instruction to the jury* about FEI's claims in whichever way is appropriate.

THE COURT: *Sure. I will do it.*

MR. O'CALLAGHAN: They will be held in abeyance.... (A 139).

THE COURT: ***The matter of the third party claims is really out of the case. I think it would be most confusing to bring that up***. Let's bring in the jury. Thank you all very much.... (A 140).

* * *

THE COURT: All parties rest now?...(A 141)

O'CALLAGHAN: With the only reservation we had --

THE COURT: What we discussed this morning?

O'CALLAGHAN: Yes. (A 142) (App P at 67a-68a).

FEI's claims as so "severed", "out of the case", "confusing", thus, removed from jury consideration, thereafter were precluded from even an offer of proof. A 370-85. Thereafter, in the Chapter and Verse submissions, FEI presented support for its claims:

> "Upon a nearly six (6) week jury trial... O&Y was provided with more than full opportunity for presentation of its claims. Meanwhile, after it became apparent that O&Y's...claims for in excess of $13 million quickly and rightfully were evaporating before the jury,... under Court direction, FEI's claims were severed upon assurance for a subsequent, separate trial... [A]t no time...was there any doubt... that the case was being presented to the jury other than exclusively upon O&Y's claim for "overage"...against which FEI was limited expressly to presentation of some defenses...*[F]EI was limited by the Court to a defensive action, not to presentation of affirmative claims*. Notwithstanding a jury verdict which vindicated FEI...nonetheless, immediately thereafter,...repeatedly and unfairly the Court characterized FEI as in "default"....
> [J. Fogarty] A 408. (Emphasis added). (App P at 69a-70a).

In consequence of O&Y's refusal to continue settlement discussions, FEI obtained a conference (February, 1992) at which *the court scheduled a trial* of FEI's claims for the last two (2) weeks of August, 1992. A 386-397.[6] On August 17, 1992, FEI appeared for trial. O&Y was not in attendance. A trial in another matter was in progress and FEI was advised that a trial of FEI claims was not scheduled to proceed. This was the first and only communication from the court that the August, 1992, trial of FEI's

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[6]FEI provided notice of its $800K *Bldg D* claim by letter dated July 5, 1985, the letter *annexed to FEI's complaint*. Nonetheless, O&Y's *uncontested* reluctance to address for settlement virtually all "D" claims is referenced in one of the several "settlement analyses" exchanged between the parties, in particular, with O&Y's President, *John E. Zuccotti*, referencing O&Y's "deal-breaker" insistence concerning O&Y's $1.9M of "D" claims, those never set forth "Chapter and Verse", nor so required by the court. A 365, etc.; see also, n. 11, *infra*). In addressing FEI's $800K Bldg D claim, uncontestedly, Fogarty stated:

> During...preliminaries to the settlement discussions, O&Y indicated an unwillingness initially to address FEI's...Building D [Claim],...[I]n the [Chapter and Verse Submissions] deponent made reference...in context of the "B/D Gatehouse". [A 289, 302-05] This ...claim...contained in FEI's pleadings...has not been withdrawn or abandoned but remains pending, as *severed* .... A 409-10. (App P at 70a-72a).

claims had been rescinded. A 399-400. (App P at 72a).

In Opinion I, the Court had stated:

> [W]ith regard to the $600,000 found by the jury...this amount was awarded with respect to the *post*-termination expenses. [I]t is clear that the jury awarded nothing for the pre-termination expenses, and did not make an award with respect to the loan.... (App J at 36a).

In Opinion II, the Court had stated:

> [T]he court's instructions...explained *the nature of the basic problem*. The *essential issue was whether FEI had defaulted* in performing under the contract *and whether O&Y had sustained loss or damage by reason of such default*. It was further explained...that O&Y was not making its case in regard to default by way of contentions about specific construction defects, delays, etc. O&Y had pitched its case *solely* on the contention that FEI's default consisted of becoming financially unable to perform.... (App L at 50a)
>
> All...*contentions of O&Y ignore certain prominent uncontradicted testimony presented by FEI*, testimony which the jury asked to have repeated .... [O]&Y... *virtually begged FEI to stay on the job* and to perform at the increased level of production. O&Y assured FEI that it *would not be hurt and that it would be made whole*... (App L at 52a).
>
> [T]here was ample evidence to support a finding that *all payments made prior to FEI's termination in April 1986 were such agreed upon adjustments*.... [T]he jury was justified in concluding that much of the additional expense, *over and above* the formal adjusted price of *$14.1 million*, was *due to O&Y's own mismanagement regarding the granite supply and other circumstances* which were caused by O&Y and which *should not be charged to FEI*... (App L at 52a).
>
> [T]he *jury could well have found that FEI's financial problems...related to its difficulty in meeting O&Y's increased*

demands, rather than requirements under the original contract, *and that what occurred was an alteration and adjustment of the contract* ***rather than a default*** *by FEI*. Of course, the jury found that at some point there was a default by FEI resulting in damages to O&Y of $600,000.... [I]t is well to keep firmly in mind that the default relied upon by O&Y was the occurrence of financial inability on the part of FEI. The jury obviously had the discernment to see that this kind of default could hardly operate to magnify this project from one in the range of $10-14 million to a $22 million or a $27 million project. Those ***enormously increased costs must have been due to factors other than FEI's financial inability, and the jury so found***.... (App L at 53a). (Emphasis added).

However, upon dismissal, inconsistently, the court stated:

THE COURT: [A]ccording to my analysis: ***Overhead, $900[K]; Taxes, $1[M] Retentions, $1,059,150***.... A 324. It seemed to me an obvious first question about the *$900,000* was, ***was it included***.... ***I really can't tell***. ***I don't know***.... If it wasn't included, then maybe there is some reason to talk about an additional claim for this additional, extra, separate amount, so called.... A 327. [A]gain, I will stand corrected on that if you find me something in the record where Mr. O'Callaghan said: The $900,000 overhead claim is withdrawn from the jury in this action.... A 328. [I] want to cover the tax reimbursement claim of a million dollars. Everything I have said about overhead applies to that.... A 330. Show me in the record where you reserved the $900,000. (App A at 3a-6a).

MR. O'CALLAGHAN: I have a recollection -- this is today, as we sit here, after many years -- that the jury, certainly counsel, but I recall as well the jury, was *directed to limit the case* essentially to the stone issue and only to the stone issue and to see the case through that perspective.

THE COURT: That has nothing to do with what the amount of the adjusted contract price is.

MR. O'CALLAGHAN: I think there was a further ruling *precluding all evidence* other than relating to the stone, which

essentially diluted and *vitiated any need* or requirement or interest *in FEI of presenting any further claims*. (App A at 8a). ...It has always been my argument at least that any additional funds that...[O&Y] advanced they did so for their own account, to their benefit, and they withheld the retention and withheld it and sued at that time.... (App A at 8a).

THE COURT: ...If $800[K] was presented in those materials and somehow I have ignored it, I will be glad to have my attention called to that mistake.... (App A at 13a). *...I think it is a shame to consume the time of the Court and the time of O&Y* and have all this litigation expense on that. I think the action should be over with. But I don't see my way to ruling a matter of law on a summary judgment... (App A at 14a). ...The party who came out of that trial really badly was O&Y. *You came up swimmingly. Let's just talk about the possibility of an appeal after a final judgment. You can't do anything on appeal, nothing....* (App A at 18a). *[U]nless you have something really very clear in the record that carves certain things out of the trial, you haven't got anything you can say on appeal*. So what has happened is that you have come out of a jury trial with a verdict which is so small that you should be saying prayers of thanks, and you have these tag-in things that you are trying to bring up. They are really not worth very much. Your client somehow is going to end up owing O&Y six figures, and if there was ever a reversal on appeal, maybe seven figures. So if your client could cooperate with O&Y in arriving at some basis for settlement.... (App A at 19a).[7] (Emphasis added).

Oral argument upon FEI's appeal was heard December 22, 1993 (the "**Oral Argument**"). (App S at 87a). In pertinent part,

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[7]Additionally, the court stated: "[I] finally put it down for trial *and then we had a conference*, and your colleague came in and reminded me that I had some homework to do...." (A 340). Rather, notwithstanding O&Y's February, 1992, conference objection, the court scheduled FEI's claims for an August, 1992, trial. In the interim, there did not occur any conference, nor communication to/by FEI and the court concerning a rescinding of the scheduled August, 1992, trial, rather an FEI July 28, 1992, letter to the court of trial readiness. A 365-67. (App R at 86a).

the Oral Argument records:

Timbers, J.: ...You, quite properly representing your client, attacked the district judge. .... **[D]id Judge Griese do anything right in this case**?

O'Callaghan: ...[T]he trial...was fair. ...[S]everance...was unfair. (App S at 88a).

McLaughlin, J.: Is it perfectly clear on the record that your claim was severed?

Winter, J.: Would you give us the page number in the appendix where the severance occurred pursuant to the order?

O'Callaghan: Yes, your Honor, if you give me a moment.

Winter, J.: I thought that would be at the tip of your tongue.

Timbers, J.: ... I'm asking where....138 and 139. Read....

O'Callaghan: ....judge says, "The application is granted upon consent." [L]ater,...the third-party claims were out of the case....

McLaughlin, J.: The relief that you want is simply a trial on your, ... third-party complaint.... That's all you want? (App S at 89a-91a).

Timbers, J.: You've asked for a new trial before a different judge...? ....[H]aving been a trial judge, there's nothing more undesirable...than what you see...the last sentence, "demand [sic] for trial before a different judge." .... Judge Griese probably made mistakes or errors, but that doesn't mean he's not competent to retry it. You say yourself it's a fair trial.

O'Callaghan: I have no doubt the trial was fair. My concern was the judge's lack of interest and the mechanisms by which he facilitated my necessity for taking this appeal. Characterizing the case as everything...[O&Y] agreed to pay just was not true, not accurate....And setting the case for trial...in...August...then when I appeared..., he just wasn't going to grant a trial and then six more months...to...appeal while...[O&Y] is in bankruptcy all over the world except New York. I think it would be fair before a different judge.

Timbers, J.: You made your point. (App S at 92a-93a).

Bernstein: .... So while it is true that there was a severance of FEI's claims, what is absolutely clear...is that all of FEI's claims on buildings A and C...went to the jury....

Winter, J.: I just don't understand how you could have let that happen. ...[I]f the claims are severed, why didn't you object to relevancy? (App S at 94a).

Timbers, J.: The judge made a finding, ...that...claims to overhead and tax...were considered by the jury and incorporated in this verdict. ....How could that have been?

Winter, J.: ...[W]as the jury asked specifically to make separate findings on overhead, retention and taxes?

Bernstein: Not at all.

Winter, J.: ...**So we have irrelevant evidence that went in and there's an assumption that the jury felt it was relevant and rendered a judgment on certain claims it wasn't told about**....

Timbers, J.: **That's what the judge said**.

Bernstein: Excuse me? ... The judge said either these claims...were within what the jury found... or he says I can't,...tell one way or the other..., then FEI never took it out from the jury's consideration. ....

Winter, J.: **It's not up to FEI to take something out of the jury's consideration, it's up to the judge**.

Bernstein: **The judge didn't do it either**.

Timbers, J.: **Maybe he was clearly wrong. Why don't you admit that**? (App S at 95a-97a).

Winter, J.: There was nothing expressed in the record that took it out. What do you mean by that?

Bernstein: The judge asked...repeatedly, "Show me in the record...where it is that I said that your claim for taxes, retention and overhead was taken...from...the jury." And all Mr. O'Callaghan said was, "**You severed my third-party claims. Well, it's true**.

Winter, J.: **That's what he's saying here**?

Bernstein: **That's right**.[8]

McLaughlin, J.: **Isn't that enough to take it out**?

Winter, J.: .... When they appealed, why couldn't you have cross-appealed?.... Why aren't you arguing that he can't appeal? (App S at 98a-99a, 102a).

Winter, J.: **The burden of your argument, as I understand it, is that the Partnership claims,[9] although severed, were, in fact, the basis for the jury verdict**.

Bernstein: **In fact, with respect to buildings A and C, correct**.

McLaughlin, J.: **The evidence went in. It was charged to the jury, it was summed up and everything, even though there was a severance**. (App S at 104a-106a). (Emphasis added).

* * *

Thereafter, on January 4, 1994, the parties filed letters pursuant to direction relating to Rule 54(b) jurisdiction. (Apps T and U, at 112a-120a; *see also* App M at 56a). Six (6) months later, on June 24, 1994, FEI presented to the Court a letter addressing the delay in issuance of a decision.[10] Upon review of a copy of the September 12-18, 1994, *Crain's New York Business*, Vol. X, No. 37 ("***Crain's***"), front-page headline: "**Bankruptcy feared at O&Y**...", with report of a bankruptcy proceeding scheduled for September 16, 1994, FEI filed a *Motion to Expedite Decision* on September 15, 1994, at 11:39 a.m., including as "Ex A", FEI's June 24, 1994, letter. (App V at 121a). At 3:30 p.m. on the same day, September 15, 1994, FEI was advised that a

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[8]See App Q at 73a and App R at 76a, in particular, App R at 83a-85a in reference to Apps F and G, at 28a-31a).

[9]"*Partnership claims*" were *not* presented for review upon this appeal.

[10]FEI's letter was received by the Clerk with multiple copies, but was not recorded upon the Circuit Court's public docket. (App V at 126a).

Summary Order dated the same day, September 15, 1994, had been filed, thus, the Motion to Expedite Decision returned, undocketed. (App V at 130a).

On September 21, 1994, FEI filed a "Motion Relating to En Banc Rehearing" requesting (i) a statement of the grounds and date of the recusal; (ii) a statement of the grounds for the delay in issuance of the Summary Order and the timing of issuance in context of the report of bankruptcy proceedings; (iii) an extension of time and increased page limit relating to a Petition for Rehearing, En Banc (the "**En Banc Petition**"); and (iv) permission to include as exhibits to the En Banc Petition, *inter alia*, copies of the court's two (2) lengthy Opinions, and transcripts of the December, 1992, conference dismissal and 43-page (45-minute) December, 1993, oral argument before the Circuit Court (the "**Motion Re: En Banc Hearing**"). (App W at 131a). This motion was denied by undated order -- absent seal -- the denial docketed on October 11, 1994 (App X at 136a), i.e., subsequent to the September 29, 1994, filing of FEI's En Banc Petition.[11]

REASONS FOR GRANTING THE WRIT

A. In Both Procedure of Issuance and Substance of Ruling, The Summary Order Evidences Fundamental Unfairness

The Oral Argument records the Circuit's discussion of the clear, reversible error evident within a voluminous record concerning the lengthy O&Y Trial; more, the absence of support

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[11]Subsequently, in the December 5-11, 1994, issue, *Crain's* reported:

O&Y pay battle slows deal
Execs salaries, bonuses rapped
Olympic salaries

1994 compensation at Olympia & York

	Base Salary	Bonus
John E. Zuccotti President and Chief Executive	$1.5 million	$562,000

for any contention that "What O&Y Agreed to Pay" was a feasible justification for the December, 1992, conference dismissal of $5M of FEI trial-severed claims. The parties' January, 1993, letter submissions removed any possible jurisdictional challenge. Thereafter, in context of the extraordinary facts and circumstances outlined, the *nine (9) month* delay in issuance of decision upon the appeal, *alone*, raises significant question concerning justification -- and explanation -- for such delay. More, the affirmance by exceedingly brief Summary Order, the denial of docketing to the Motion to Expedite Decision, the unexplained recusal announcement contained solely in the Summary Order -- all on the eve of a publicly reported proceeding relating to a possible O&Y bankruptcy -- transformed already significant questions relating to delay (and prejudice) upon the appeal into serious questions of fundamental fairness.

The Circuit's own procedures and precedents *preclude* "recusal" announcement *nine (9)* months after oral argument, *see* opinion upon rehearing in *Murray v. National Broadcasting Co., et al.*, No. 93-9335 (No. 1566) (2nd Cir. Aug. 12, 1994) (recusal under statutory authorities, viz., 28 U.S.C. § 46 and Second Circuit Quorum Rule § 0.14(b) *may* be authorized "*immediately before* oral argument") (Apps BB at 141a, EE at 142a, FF at 143a).

Such recusal as occurred in this action, particularly because absent all stated grounds and announced so long after oral argument, *prejudicially* affects *en banc* rights upon request for rehearing, i.e., pursuant to FRAP R. 35(b) and Second Circuit Local In Banc Rule 35 (Apps CC at 141a and DD at 142a) because to be "heard or reheard" *en banc requires* that "a judge ... who was a member of the panel that rendered a decision ... requests a vote....", FRAP R. 35(b) (emphasis added). Thus, a recusal in the manner outlined in these proceedings effectively precluded any true *en banc* possibility; moreover, availability for *dissent*, with obvious *en banc* consequence, unfairly was mooted. For these reasons -- at least -- the grounds, manner and timing of recusal

publicly should be stated.[12]

B. There Was a Severance of FEI's Claims; The O&Y Trial Was Not About "What O&Y Agreed To Pay"

Severance is to avoid prejudice, not create it. R. 42(b); *United States Gypsum Co. v. Shiavo Bros., Inc.*, 668 F.2d 172 (3rd Cir. 1981). Truly, a "scandalous" waste continues, that of any objective review of a record which shows nothing other than that a litigant, FEI, has been precluded from presentation of meritorious claims upon court 1988 assurances of a fair and impartial, severed jury trial; thereafter, the facade of a useless, nonetheless, urged, settlement strategy and the subsequent unfair denial of any trial upon grounds retrospectively posited as legitimate, notwithstanding manifestly in conflict with two (2) earlier Opinions and 1988 trial rulings. The court's discretion for severance does not include a change of decision and dismissal absent trial before the trier of fact and absent fair opportunity for presentation of proof. *See generally, Knapp v. McFarland*, 457 F.2d 881 (2nd Cir. 1972). Indeed, FEI's claims are supported in the "Chapter and Verse Submissions":

> (a) During the [pre-termination period]...O&Y failed...to pay...FEI's *overhead*,...as *agreed*,....(b) Similarly, for... *withholding tax* ... imposed upon FEI ...in breach of O&Y commitment to compensate FEI for this obligation....(A 229-30). (App R at 76a).

> [O&Y] PX 15 admits that the amount of *$1,589,225* was due FEI...but *not* paid, a substantial portion of which amount is comprised of the A/C Retention....(A 104, etc.) ....*[O]verhead* ...reimbursed...directly...and/or monies FEI

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[12]In the December, 1994, *New York Times* report of Honorable William H. Timbers' death, there was mentioned that Judge Timbers continued to hear appeals through June, 1994. Respectfully, the circumstance of Judge Timbers' death should not affect the merits of this Petition's "recusal" issues.

would earn...upon Buildings B, D....[13] (A 288-90). (App R at 77a).

Notwithstanding the court's view that "O&Y has more than made up this deficiency" (A 190) (i.e.,failure to credit/return FEI's $735K Bldgs "A/C" Retention), indisputably, O&Y's *pre*-termination advance was for "new work", was performed at O&Y's request and for O&Y's benefit, thus, for O&Y's account.[14] Likewise, indisputably, FEI's Bldgs A/C Retention was earned during an *earlier* period, i.e., earned prior to the pre-termination advance. (A 237).[15]

In the nearly 3500 page trial transcript and 1000 page

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[13]Notwithstanding the court's declining to recognize any theory of recovery grounded upon FEI incurred *expenses*, e.g., overhead, (SA 136-37), nonetheless, well-known theories exist, e.g., the **Eichleay** formula, *see Eichleay Corp.*, 60-2 B.C.A. (CCH) ¶2688 (1960); *accord S. Leo Harmonay, Inc. v. Binks Mfg. Co.*, 597 F.Supp. 1014 (SDNY 1984), *aff'd* 762 F.2d 990 (2nd Cir. 1985). *See also, George Hyman Const. v. Wash. Metro. Transit Auth.*, 816 F.2d 753 (D.C.Cir. 1987) (proof by impairment of capital); *Peter Kiewit Sons Co. v. Summit Construction Co.*, 422 F.2d 242 (8th Cir. 1969) (proof by actual costs).

[14]More, O&Y's failure to make retainage payments was a material breach, excusing FEI. *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 248 U.S. 334, 39 S. Ct. 102, 63 L.Ed. 275 (1919). Notably, the absence of FEI's acceptance of "final payment" preserved FEI's retention claims. *Najjar Industries, Inc. v. City of New York*, 446 NYS 2d 302 (A.D. 1 Dept., 1982), *aff'd* 454 NYS 2d 65, (Ct. App., 1982).

[15]O&Y's *subsequent* "pre-termination advance" was not documented by O&Y as "payment" for retainage, was not *pled* as a "payment" affirmative defense and should not now be "credited" retrospectively to O&Y's benefit. More, *O&Y has conceded* that $735K in retention was neither "credited" to FEI nor part of the now posited "Everything O&Y agreed to pay" theorem. Convincingly, in O&Y's **Answer** to FEI's claims (July, 1986), O&Y included fourteen (14) affirmative defenses, none of which are identified as "payment", rather one (¶51) identified as a *concession of non-payment*! In ¶51, O&Y admitted that the retention was intended to be tried *separately* as an off-set to O&Y's Ex. 15 damage submission. Simply, in 1986, O&Y anticipated that the trial *could not* be about "what O&Y agreed to pay", rather, that FEI's retention, an "*acknowledged adjustment*", would have to be *returned*, notwithstanding any "advance" in its own interest O&Y might provide. (App R at 78a).

supplemental record, there does not appear any contention that the jury was requested to give a verdict upon "what O&Y agreed to pay": no one heard, argued or charged upon such theory, nor was such theory contained in either of two (2) lengthy Opinions nor therein remotely referenced. This contention appears first and only at the December, 1992, dismissal conference.[16] (App A at 4a). The court's analysis concerning "renegotiation" of O&Y's pre-termination advances - [or "waiver", as FEI has contended (A 182)] - into a court "adjusted" Adjusted Contract Price" of $22M does not provide assistance to O&Y. Precisely, this is what the jury so concluded in rejecting all O&Y pre-termination expenses because not proven incurred *by/for FEI*, rather, acknowledging reimbursement solely of limited *post*-termination expenses, ($600K), found reasonable, i.e., not extravagant. The court instructed the jury concerning O&Y's "damages" summary, "Ex 15" (App H at 32a):

> [I]t's up to you *whether it is an accurate summary*, and it is up to you to determine *whether payments and expenses* over and above the contract price *were reasonably incurred. If they*

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[16]Significantly, it was only upon appeal that O&Y championed the court's analysis of jury verdict "adjusting" the "Adjusted Contract Price" from $14M to $22M. Upon appeal, O&Y contended (O&Y Br. at 22):

> "[T]he issue of what O&Y agreed to pay FEI -- *i.e.*, the "adjusted contract price" -- was covered by Special Interrogatory Number 3.... In order to answer this question, the jury had to determine what the "adjusted contract price" was. *The "adjusted contract price was, of course, the total amount price that O&Y had agreed to pay FEI."*

However, throughout the 1988 trial and in all argument prior to the 1992 dismissal, consistently, O&Y had argued that the "Adjusted Contract Price" was $14M. As stated in **Opinion I**: "*[A]ccording to O&Y*, the undisputed evidence at trial revealed that the *adjusted contract price* was $14,109,745...". (App J at 36a) Likewise, **Opinion II** confirms O&Y's consistent $14M Adjusted Contract Price contention, i.e., until the appeal:

> "[O]&Y argues that no issue or evidence was presented to the jury which could in any way allow it to find that the adjusted contract price was $22 million. *O&Y contends that the adjusted contract price was conclusively established as being $14.1 million and that indeed the court so instructed the jury.*" (App L at 50a).

> *weren't incurred or if they were simply extravagant*, they are not reasonably incurred.... (T 3296-97)

The jury did not "credit" to O&Y reimbursement for expenses which either "weren't incurred" or "were simply extravagant". Consistently, the court confirmed this jury determination of extravagance, e.g., in Opinion II:

> [In Ex 15], O&Y presented the figure of $14.1 million as being the adjusted contract price and presented other figures indicating that $12.9 million had been spent over and above that adjusted contract price. However, *the court did not in any sense instruct the jury that it should accept any figure from that exhibit and told the jury that they should determine whether the figures were accurate*.... [T]he jury was justified in concluding that *much of the additional expense*, over and above the formal adjusted price of $14.1 million, *was due to O&Y's own mismanagement*...which *should not be charged to FEI*. (App L at 50a-52a).

Thus, the jury concluded that O&Y waived expenses both below and above the "Adjusted Contract Price", or otherwise was responsible for its own purported additional expenses.[17] *See Gross v. Black & Decker (U.D.) Inc.*, 695 F.2d 858 (5th Cir. 1983). The "basic issue" before the jury was not "what O&Y agreed to pay", rather, what was the default of FEI, if any, and at what amount of loss or damage to O&Y. The trial addressed what O&Y contended it sustained as damages - a contention summarily rejected by the jury, excepting in *de minimus* amount - not what O&Y "agreed to pay".

C. There Was Absent Rule 49(a) Authority For Dismissal

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[17]FEI presented a defense to the Bagnelstown loan: "[T]he *defense of payment*. .... [T]he loan...was or should have been satisfied from ...Retention[s].... [O]&Y's contention that it was authorized to apply Retention[s] to whatever use O&Y chose is prohibited by the Contract... ...*FEI was precluded from presenting any evidence*...." (App R at 85a).

Waiver of jury trial right upon use of special interrogatories occurs only upon questions presented without objection which are raised by the pleadings or evidence. Implicit in the statement of the rule is its context of pleadings and evidence submitted to that jury. *See generally, Hearn v. City of Gainesville*, 688 F.2d 1328 (11th Cir. 1982).[18] Here, there was both objection and severance - FEI's claims were "*really out of the case*".[19] Indisputably, the jury found that: (i) O&Y substantially did *not* perform its obligations with respect to stone supply; (ii) *this* O&Y failure did *not* cause an FEI financial inability to perform, and (iii) the amount of expenses O&Y reasonably incurred "above the adjusted contract price" to complete or repair FEI's work...was...$600K. A 174-75. Thus, the jury determined that FEI was *not* in default: a $600K additional O&Y expense, only 4% of O&Y's trial evidenced Adjusted Contract Price, $14,109,745, indeed, only 2% of O&Y's total construction cost, $27M. Accordingly, there was *not* a material breach of contract by FEI.[20]

D. FEI Substantially Performed

In April, 1986, O&Y had incurred expenses approximating $22M for Bldgs A and C. Definitively, the jury did not award a

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[18]Once the court decides to submit special interrogatories, the court "must cover all material factual issues". *Matine v. Union Pacific R., Co.*, 714 F.2d 1028 (9th Cir. 1983). *Accord, Cutlass Productions, Inc. v. Breyman*, 682 F.2d 323 (2nd Cir. 1981).

[19]As explained in *Taherzadeh v. Clements*, 781 F.2d 1093, 1098 (5th Cir. 1986), upon objection for failure to submit an issue: "[T]he district judge has no authority to make an express finding under Rule 49(a) concerning that same issue. See Wright and Miller, *Fed. Prac. & Proc.* §2507 (1971)."

[20]Moreover, the verdict requires disgorgement from O&Y of at least $1,589,225, the amount admittedly due FEI upon the Adjusted Contract Price, nonetheless, an amount admittedly not paid:

$14,109,745 "Adjusted Contract Price"
-12,520,520 "Amount Paid to FEI per contract"
1,589,225 [Amount due and unpaid], O&Y Ex 15,etc.

"penny" of such "pre-termination expenses" (SA 121) (App R at 82a), i.e., the $7.8M O&Y advance from the November, 1984, "formal" Adjusted Contract Price amount, $14M, to the April, 1986, *termination date* amount, $22M. Thus, the $600K jury damage award - 2.7% of the (April, 1986) court "adjusted" Adjusted Contract Price, $22M - was an insubstantial "default". Definitively, as of April, 1986, FEI substantially had performed and was entitled to recover upon its claims. *See generally*, *United States v. Zara Contracting Co.*, 146 F.2d 406 (2nd Cir. 1944) and *Buckley & Co. v. New York*, 505 N.Y.S. 2d 140 (A.D. 1 Dept., 1986) (contract price less cost of completion); *see also*, *Wade Lupe Const. Co., Inc. v. B & J Roofing*, 444 NYS 2d 245 (AD 3 Dept., 1981) (*quantum meruit* recovery authorized).[21]

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[21]O&Y terminated FEI upon **Bldg B** in April, 1985 upon contention for FEI default upon Bldgs A and C. (A 43, 280-85). However, FEI substantially had completed performance upon Bldgs A and C. As FEI partially had performed upon Bldg B at the time of O&Y's anticipatory wrongful termination upon Bldgs A and C, FEI may recover damages upon the Bldg B breach, including a reasonable profit, *see Kenford Co., Inc. v. County of Erie*, 502 NYS 2d 131 (Ct. App., 1986); *Wolf & Munier v. Whiting-Turner Contracting*, 946 F.2d 1003 (2nd Cir. 1992). Likewise, FEI may recover upon the **Bldg D** claim grounded upon substantial Bldg D performance, *see generally Alm v. Unified Church Structures, Inc.*, 403 NYS 2d 151 (AD 4 Dept., 1978).

CONCLUSION

There are serious questions raised concerning the fundamental fairness of both the issuance of the Summary Order and its content. Accordingly, FEI requests that this Petition be granted and in consequence that an order duly be entered which grants to FEI reversal and remand for jury trial of all FEI claims in at least the following approximate amounts upon the following Project Buildings:

Bldgs A and C:		**Bldgs B and D:**	
Retention	$735,213.	B Retention	$ 49,683.
Overhead	900,000.	D Retention	261,886.
Taxes	1,000,000.	W'garden Retention	12,368.
		B Tower	473,000.
		D Performance	796,000.

Further, FEI requests that such order duly be entered which grants to FEI judgment upon its Bldgs A and C breach claim, grounded upon O&Y Ex 15, in the amount of $1,589,225. For these reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
February 10, 1995

Respectfully submitted,

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